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IN THE

Supreme Court of the United States

October Term, 1973
NO. 73-1824

NEW ORLEANS BOOK MART, INC.
FREDERICK ENO – MAYHEW LUND,
ROBERT MITCHUM,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ROBERT EUGENE SMITH
Suite 2005
100 Colony Square
Atlanta, Georgia 30361
Attorney for Petitioners
New Orleans Book Mart, Inc.
Frederick Eno-Mayhew Lund,
Robert Mitchum

GILBERT H. DEITCH
Of Counsel

THE PAUL M. HARROD COMPANY, BALTIMORE, MARYLAND 21234

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NO. _____

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FREDERICK ENO – MAYHEW LUND,
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Petitioners

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Petitioners New Orleans Book Mart, Frederick Eno-Mayhew Lund and Robert Mitchum respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on February 19, 1974.

Opinions Below

The opinion of the Court of Appeals is reported in 490 F.2d 73, *United States of America v. New Orleans Book Mart, Inc., et al.*, and appears in Appendix "A" hereto. The opinion of the District Court denying certain pretrial motions is reported in 328 F. Supp. 136, and appears in Appendix "B" hereto.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 19, 1974. A due and timely Petition for Rehearing and Petition for Rehearing *En Banc* was filed by Petitioners and denied by the Court of Appeals by Order entered on April 3, 1974. A copy of the letter from the Clerk of the Court of Appeals advising Petitioner of the entry of the said Order appears as Appendix "C" hereto. On April 22, 1974, the Court of Appeals granted a stay of the issuance of the mandate. On May 2, 1974, Mr. Justice Powell made an Order extending the time for filing a Petition for Writ of Certiorari in the cause to and including June 3, 1974. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether the provisions of Title 18 United States Code, § 1465, on their face and as construed and applied to authorize the judgments of conviction of Petitioners herein, were, prior to June 21, 1973, unconstitutionally vague, violating the First and Fifth Amendments, because:

(a) The statute concededly does not contain a description of the specific sexual conduct *Miller v. California*, 413 U.S. 15, held was constitutionally mandated, and prior to June 21, 1973, the statute had not received an authoritative construction reading the necessary terminology into the statute;

(b) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films offend national standards, which nationwide standards this Court held were unascertainable, unprovable and non-existent;

(c) Prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications and films appeal to the prurient interest of the average person in the Nation as a whole, which test this Court labelled "unrealistic";

(d) Prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications and films were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous";

(e) Prior to June 21, 1973, the statute was so "vague, ambiguous and essentially meaningless" that this Court was compelled to act as an unreviewable board of censorship "subjectively judging each piece of material" charged with being obscene under § 1465.

2. Whether the Indictments herein in statutory language are fatally defective because they fail to inform Petitioners of

the nature and cause of the accusations against them, in violation of the applicable provisions of the Sixth Amendment.

3. Whether the provisions of Title 18 United States Code, §§1465 and 2, on their face and as construed and applied to authorize the judgments of conviction of Petitioners herein, under a standard for judging *scienter* solely by alleged proof of "a general knowledge that the material is sexually oriented," or knowledge of the "contents" of the materials involved, and without competent evidence to establish even that Petitioners had such knowledge, abridge the freedoms of speech and press and arbitrarily deprive Petitioners of their liberty and property without due process of law, in violation of the First and Fifth Amendments.

4. Whether the provisions of Title 18 United States Code, §1465, on their face and as construed and applied to authorize the judgments of conviction of Petitioners herein where the Indictments, trial and convictions of Petitioners were concededly governed only by the standards for judging obscenity enunciated in *Memoirs v. Massachusetts*, 383 U.S. 413, and where the Government presented no evidence that the publications and film exceeded national community standards or were utterly without redeeming social value, and where the undisputed record established that the materials did not exceed national community standards and had educational and other social value, violate the free speech and press and due process provisions of the First and Fifth Amendments.

5. Whether the provisions of Title 18 United States Code, §1465, on their face and as construed and applied to authorize the judgments of conviction of Petitioners herein,

where the publications and film named in the Indictments are not obscene and are entitled to constitutional protection as a matter of law, violate the free speech and press and due process provisions of the First and Fifth Amendments.

6. Whether the provisions of Title 18 United States Code, §1465, on their face and as construed and applied to authorize the judgments of conviction of Petitioners herein, where the publications and film, although constitutionally protected in fact and in law under the *Memoirs* test, were nevertheless held obscene under both the *Memoirs and Miller* tests by the Court of Appeals, abridge the exercise of freedoms of speech and press, arbitrarily deprive Petitioners of their liberty without due process of law and constitute an *ex post facto* and retroactive unforeseen judicial construction of the provisions of the statute, all in violation of the guarantees of the First and Fifth Amendments and Article I, §9.

Constitutional and Statutory Provisions Involved

The pertinent provisions of the First, Fifth and Sixth Amendments, and Article I, §9 of the Constitution, and of 18 U.S.C. 1465 and 2 appear in Appendix "D" hereto.

Statement

1. A Two-count Indictment was returned on April 25, 1970, in the United States District Court for the Eastern District of Louisiana, New Orleans Division, charging Petitioners, with violations of 18 U.S.C. 1465 and 2 [App.[1]

[1] The designation "App." refers to the two-volume Appendix filed in the Court of Appeals. A third volume of the Appendix, separately paginated, will be referred to as "App., Vol. 3."

128-129]. It was charged in Count I that on February 23, 1970, the Petitioners in the New Orleans Division of the Eastern District of Louisiana did "knowingly" transport and cause to be transported in interstate commerce for the purpose of sale an "obscene" motion picture film entitled "Holiday Balls." A similar charge was contained in Count II, alleging the knowing transport and causing to transport in interstate commerce on February 23, 1970, an alleged obscene book entitled "Vol. 1/No. 1 Hit and Fun'..

A separate one-count Indictment [App. 169-170] was returned on April 23, 1970, charging that on April 9, 1970, in the New Orleans Division of the Eastern District of Louisiana, Petitioners did "knowingly" transport in interstate commerce for the purpose of sale an obscene book entitled "Auto-Fellatio & Masturbation," all in violation of 18 U.S.C. 1465 and 2.

The two aforesaid Indictments were consolidated for a trial with a third Indictment [App. 7577, 158-160], and the consolidated proceedings came on for trial before the Honorable Herbert W. Christenberry, and a jury, on August 2, 1971. On August 7, 1971, the jury returned a verdict of guilty on each count of the Indictments in which the Petitioners were involved [App. 930-931]. A motion for new trial [App. 110-111] was denied [App. 938]. The Court imposed upon the Petitioners sentences of commitment and fines. Petitioners are presently enlarged on bail pending appeal.

2. In pretrial proceedings, Petitioners moved to dismiss the Indictments contending, *inter alia,* that the provisions of

18 U.S.C. 1465 and 2, on their face and as construed and applied, violated provisions of the First and Fifth Amendments because the said statutes were vague and overbroad, failing to provide either fair notice of what conduct was prohibited or adequate standards and safeguards for the protection of material ordinarily entitled to the guarantees of the First Amendment. See, 328 F. Supp. at 143. Petitioners also challenged the sufficiency of the Indictments, contending that they failed to inform them of the nature and cause of the accusations against them, both with respect to the elements of obscenity and *scienter.* See, 328 F.Supp. at 146-147. It was also alleged in the motion to dismiss that the film and publications charged in the Indictments were not obscene as a matter of law under the Constitution.

Although Petitioners' motions to dismiss were denied, District Judge Rubin observed that "Despite the plethora of obscenity cases that have inundated the Supreme Court since the premiere decision in Roth v. United States [citation omitted], a majority of the Justices have never agreed on a definition of obscenity or on criteria that enable a court to determine what is obscene." 328 F. Supp. 136, 140.[2]

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[2] During the hearing on Petitioners' motion to dismiss, an extended discussion took place between District Judge Rubin and Government counsel concerning the extreme difficulties in translating the *Roth-Memoirs* definitions of obscenity into anything approaching meaningful guidelines for courts. prosecutors and the public [App. Vol. 3, 28-47]. In the light of the decisions following *Roth.* the District Judge stated that he could not "perceive how we can any longer apply the words that you have read from Roth amplified in Fanny Hill" [*Ibid.*,36]. Judge Rubin added, "I can't comprehend what you are saying except in terms of applying an infinite variety of individual judgments, and I suggest this isn't law enforcement at all. This is chaos,..." [*Ibid.*, 39].

Petitioners also moved for bills of particulars in an unsucessful attempt to ascertain what the essential elements of obscenity were as charged in the Indictments and whether the Indictments charged Petitioners with *scienter* or knowledge of the obscene character of the materials.

3. At trial, although the jury was instructed to determine the customary limits of candor by the contemporary standards of the "entire national community" [App. 912-916], and to determine whether the challenged material appealed to the prurient interest of the average person in the national community as a whole [App. 911-912], the Government offered no evidence by which the jury could determine the content of the "national" standards. Petitioners called expert witnesses who testified that the charged materials did not appeal to prurient interest, did not offend national community standards, and possessed substantial educational and other social values.

(Footnote 2 Continued)
Government counsel in reply stated: "Your honor, the Supreme Court for 17 years has not been able to give us a standard. You are suggesting for us to come up with a standard." [*Ibid.*, 41]. The Court replied, among other things: "Certainly no publisher ought to have at the risk of being sent to jail to decide for himself whether a particular judge, Judge Rubin, may or may not have had a good breakfast and thinks something is obscene in Louisiana and Judge 'X' in Oregon thinks it not obscene in Oregon . . . I think the need is for a national standard that will be intelligent to juries, to courts, to judges, to United States attorneys and the publishers rather than just an *ad hoc* thing that is worse" [*Ibid.*, 45-46].

On the issue of *scienter,* the following evidence was adduced at trial:

A Government witness, Harold V. Hughes [App. 298], testified that he was an FBI agent posing as an Air Force veteran. He approached the Defendant Lund in February, 1970, and stated that he was interested in going into the adult book business [App. 307]. The Defendant Lund introduced him to the Co-Defendant Thevis [App. 309]

4. The instructions of the trial court to the jury on the issue of obscenity encompassed the *Roth-Memoirs* standards, as aforesaid. With regard to *scienter,* the trial court's instructions to the jury, discussed in greater detail later, permitted the jury to convict if the jury was satisfied beyond a reasonable doubt that Petitioners and their Defendant "were in some manner aware of the character or contents of the material" [App. 92].

5. The Court of Appeals held that the provisions of 18 U.S.C. 1465 were not void for vagueness or overbreadth. Recognizing that "Defendants were convicted in what may be called a no-man's land" [490 F.2d at 75], the Court nevertheless held that *Miller* and its companion cases did not preclude application of the *Memoirs* standards to material involved in transactions occurring prior to the decision in *Miller.* However, to assure that no one is convicted under standards allegedly more restrictive than those in *Memoirs,* the Court decided that it would employ both the *Miller and Memoirs* definitions of obscenity. On this basis, the Court concluded that the publications and film involved herein are "within the legal parameters of obscenity."

In rejecting Petitioners' constitutional challenges to the vagueness, prior to June 21, 1973, of §1465, the Court relied upon its prior opinion in *United States v. Thevis,* 484 F.2d 1149 (5 Cir. 1973) (Petitions for Certiorari pending[3]). In the prior *Thevis* opinion, the Court of Appeals had declared, in the light of *Miller,* that the "utterly without redeeming social value" test and the national community standards test were no longer governing. The Court had recognized that the statute was required to define specific sexual conduct, but held that the statutory requirement could be satisfied by a judicial gloss.

The Court of Appeals also held that the failure of the Government to prove by competent evidence that the material here involved exceeded contemporary community standards or was utterly without redeeming social value did not invalidate the judgments of conviction. With respect to *scienter,* the Court held that "Scienter as to the exact content of the material transported, rather than a general knowledge that the material is sexually oriented, is not required."

REASONS FOR GRANTING THE WRIT

1. The judgment against the Petitioners herein is in direct conflict with cases decised in the Ninth, Tenth and First Circuits. *United States v. Henson,* unreported, (9 Cir., No.

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[3] See *Thevis v. U.S.,* October Term 1973, No. 73-1075, Peachtree House Co., Inc., October Term, No. 73-1091.

73-2063, October 5, 1973),[4] *United States v. Friedman*, 488 F.2d 1141 (10 Cir. 1974); *United States v. Palladino*, 490 F.2d 499 (1 Cir. 1974). In *Henson*, as in the case at bar, a judgment of conviction was rendered by utilizing the *Roth-Memoirs* test. In vacating the judgment of conviction, the Court said:

> "In instructing the jury in respect to the question of obscenity, the trial judge generally and properly enunciated the tests as they were to be found in controlling Supreme Court authorities existing at the time, principally, *Roth v. United States*, 354 U.S. 476 (1957), and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). Thereafter, on June 21, 1973, and after the entry of the judgments of conviction here challenged, the Supreme Court issued a series of opinions in which its prior definitions of obscenity were in part repudiated and in which some elements of the previously existing tests applied by the District Court in this case were generally characterized as vague, ambiguous, or essentially meaningless." (Emphasis added).

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[4] A copy of the *Henson* Opinion is attached hereto as Appendix "E". The Government, in seeking rehearing, with a suggestion for a rehearing *en banc*, stated: "The opinion of the panel . . . must be read as holding that the obscenity test used at trial was repudiated by the Supreme Court in *Miller v. California* as unconstitutionally vague." (Govt. Pet. for Rehearing in *Henson*, 11). On December 3, 1973, the Court made an order in *Henson*, deferring action on the Government's petition for rehearing with suggestion for rehearing *en banc*, "pending the court's disposition of a number of cases now pending before the full court en banc, the disposition of which may affect the court's opinion in the subject case."

After vacating the judgment of conviction, the Court remanded the case to the District Court for reconsideration in light of this Court's decisions of June 21, 1973, and in light of *Stroud v. State*, 300 N.E.2d 100 (August 21, 1973), and *Mohney v. State*, 300 N.E.2d 66 (August 21, 1973), wherein the Indiana Supreme Court declared that State's obscenity statute unconstitutionally vague in light of this Court's June 21, 1973 decisions.

In *United States v. Friedman, supra*, the court vacated an obscenity conviction and remanded to the District Court for a new trial. The Court stated that it was its view

> "that the several recent [obscenity] decisions of the Supreme Court require a reconsideration of the standards applicable to cases of this nature.... These decisions... require a re-examination of the facts of this case together with the determination of what may be the applicable standards... A consideration of the application of national or local standards should be initially made by the trial court in addition to the determination of what such standards may be." (488 F.2d at 1141-1142).

In *United States v. Palladino*, 490 F.2d 499 (1 Cir. 1974), the Court reversed a federal obscenity conviction which occurred prior to June 21, 1973. The Court stated that the "defendants are caught in a period of transition, their prosecutions having taken place before the Miller decisions. They cannot fairly be subjected to penalties for violation of rules established after their actions." (490 F.2d at 500).

2. In light of *Miller v. California*, 413 U.S. 15, and the related cases, the federal criminal statute involved herein,

affecting First Amendment rights, was prior to June 21, 1973, unconstitutionally vague for the following five reasons:

(a) the statute concededly does not contain a description of the specific sexual conduct *Miller* held was constitutionally mandated, and prior to June 21, 1973, the statute had not received an authoritative construction reading the necessary terminology into the statute;

(b) prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications offend national standards, which nationwide standards this Court found were unascertainable, unprovable and non-existent;

(c) prior to June 21, 1973, the statute was authoritatively construed as requiring proof that charged publications appeal to the prurient interest of the average person in the Nation as a whole which test this Court labeled "unrealistic";

(d) prior to June 21, 1973, the statute had been authoritatively construed as requiring proof that charged publications were "utterly without redeeming social value," a test this Court found "unworkable" and "ambiguous";

(e) prior to June 21, 1973, the statute was so "vague, ambiguous and essentially meaningless" that the Court was compelled to act as an Unreviewable Board of censorship "subjectively judging each piece of material" charged with being obscene under § 1465.

Some aspects of the constitutional issue here involved were briefed and argued before this Court in *Hamling, et al v. United States,* October Term, 1973, No. 73-507.

In brief, 18 U.S.C. §1465 is not on its face limited to any specifically defined sexual conduct. The trial court's instructions to the jury defining "obscenity" were restricted to the three-part *Memoirs* test. Neither the statute on its face nor as construed and applied by the court's instructions was confined to specifically defined depictions or representations of sexual conduct. At no time prior to June 21, 1973, had this Court or any other federal court had occasion to authoritatively construe the federal obscenity statute to limit its reach to specifically defined sexual conduct, and in *United States v. 12 200-Ft. Reels of Film,* 413 U.S. 123, n. 7., this Court only stated that it was "prepared" to construe the vague terms "obscene, lewd, lascivious, filthy," in accordance with *Miller.* The court below has acted on the assumption that "the definition of Miller is a gloss properly added to [§1465]." *United States v. Thevis,* 484 F.2d 1149, 1155. Such a ruling which reads provisions into a law which were not present at the time the offense allegedly was committed, or when the indictment was returned or when the case was tried, constitutes a sheer deprivation of liberty without due process of law (*Rabe v. Washington,* 405 U.S. 313; *Cole v. Arkansas,* 333 U.S. 196; *DeJonge v. Oregon,* 299 U.S. 353), an act of judicial legislation (*United States v. Robel,* 389 U.S. 258), and a retroactive judicial construction barred by the *ex post facto* and due process provisions of the United States Constitution.

The jury in the case herein was required to measure the alleged obscenity of the publications and film by "national

community standards," a national standard which this Court has termed "hypothetical," "unascertainable," "abstract," "unrealistic" and "an exercise in futility." Standards which are hypothetical, abstract and unascertainable are precisely the standards which this Court has uniformly condemned as violative of the free speech and due process provisions of the Constitution. These are the kind of standards that may trap the innocent by not providing fair warning, and the kind of standards which sweep within their ambit speech and press ordinarily entitled to constitutional protection. These are also the standards which permit arbitrary and discriminatory enforcement, and which delegate basic societal policy matters to police officers, judges and juries for resolution on an *ad hoc* and subjective basis. See, *Grayned v. City of Rockford*, 408 U.S. 104, 108-109; *Smith v. Goguen*, 94 S.Ct. 1242; *Lewis v. New Orleans*, 94 S.Ct. 970; *Plummer v. City of Columbus*, 94 S.Ct. 17; *Gooding v. Wilson*, 405 U.S. 518; *Papachristou v. City of Jacksonville*, 405 U.S. 156.

The Court of Appeals below has not controverted the allegation made by Petitioners that the "national community standard" under which the judgments of conviction herein were rendered is an obviously vague, ambiguous, uncertain and overbroad standard in the light of the decisions of this Court on June 21, 1973. The court is content to simply uphold the judgments of conviction in the light of the newly enunciated standards. It is obviously plain that such a "local community standard" was not in existence during the entire trial proceedings and was never given to the jury in the case herein. There is, here again, it is submitted, the same failure of due process notice, the same type of retroactive judicial construction and legislation.

With respect to the element of social value and importance, this Court unanimously agreed that the concepts of "social value" and "importance" are constitutionally ambiguous and "unworkable" and, indeed, virtually without any meaning at all. Thus, the jury was permitted, under the federal obscenity statute as construed and applied by the trial court, to exercise their individual whims and prejudices as to what each of the jurors deemed socially desirable.

Finally, in this connection, Petitioners urge again that the vagueness, ambiguity and unworkability of the standards for judging obscenity are exemplified by the candid expression of this Court that under the *Roth-Memoirs* test, the Court "was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment . . . the *Redrup* procedure has cast us in the role of an unreviewable board of censorship for the 50 States subjectively judging each piece of material brought before us." 413 U.S. at 22.

Where Justices of the Supreme Court are compelled to "subjectively" judge each publication brought before them because of the vagueness and unworkability of the standards which the Court itself had enunciated, and which has led to divergent and contradictory views by members of the Court, it appears constitutionally impermissible to uphold a judgment of conviction which has been rendered under such incomprehensive criteria.

3. In light of this Court's decisions of June 21, 1973, the Indictments herein are fatally defective, because they fail to inform Petitioners of the nature and cause of the accusations

against him, in violation of the Sixth Amendment.

In *United States v. Orito*, 93 S.Ct. 2674, 2679, this Court vacated the judgment of the District Court and remanded the case "for reconsideration of the *sufficiency of the indictment* in light of *Miller v. California, supra; United States v. Twelve 200-Ft. Reels, supra,* and this opinion." (Emphasis added).

The necessity of examining the sufficiency of the Indictments herein flows naturally from this Court's recognition that neither the words of the statute alone ("obscene, lewd, lascivious, filthy") nor the gloss put on these words by *Roth-Memoirs* gave sufficient notice of the offense charged. In the case at bar, the sole charge in the Indictments is that Petitioners transported in interstate commerce "obscene, lewd, lascivious or filty" publications and a film. Petitioners duly moved to dismiss the Indictments on the ground that they failed to specify the elements constituting "obscenity" [App. 42, 142-143]. The trial court rejected Petitioners' contention, stating "insofar as these arguments are predicated on the notion that the term 'obscene' lacks sufficient meaning, they have already been dealt with [in the Court's prior discussion holding the use of the term 'obscene' in the statute not unconstitutionally vague]." 328 F. Supp. at 147. Nevertheless, the trial court also stated that "Despite the plethora of obscenity cases that have inundated the Supreme Court since the premiere decision in Roth v. United States [citation omitted], a majority of the Justices have never agreed on a definition of obscenity or on criteria that enable a court to determine what is obscene." 328 F. Supp. at 140.

In the decisions of June 21, 1973, the Court was unanimous on one point, and one point only—that the

Roth-Memoirs test had failed to give adequate guidance as to what publications were criminal and what publications were unconditionally protected by the free speech and press provisions of the First Amendment. The *Roth-Memoirs* test was rejected as unworkable and unsupported by any member of the Court. The confusion surrounding this "legal term of art" was explored by the Fifth Circuit in *United States v. Groner,* both by the panel (475 F.2d 550]5 Cir. 1972]) and by the court en banc (479 F.2d 577]5 Cir. 1973]).[5] Judge Clark commented on the Court's failure to give "the respective limits of 'free press' rights under the First Amendment and unprotected publications which exploit sexuality," stating that "the judiciary has created a quagmire" (475 F.2d at 559). Judge Gewin, speaking for the majority of the en banc court, stated that the familiar *Roth-Memoirs* test "represents an amalgam of the individual views of members and former members of the Supreme Court, taken from their respective concurring or dissenting opinions in *Roth* and subsequent decisions involving obscenity." (479 F.2d at 580). He concluded that the *Roth-Memoirs* test "is not the prevailing test" (479 F.2d at 580). In overruling the panel's decision in *Groner,* Judge Gewin stated: "[I]t is apparent that the panel opinion was decided on an erroneous view of the test to be applied in determining obscenity. Neither the 'patent offensive' nor the 'utterly without redeeming social value' elements are included in the test laid down by the Supreme Court, nor is the community national in scope." (479 F.2d at 583). Judge Ainsworth (joined by Judges Gewin, Bell, Coleman, Dyer, Clark, Ingraham and Ronney) recognized that "accurate guidelines . . . based on past decisions of the Supreme Court, are hard to find." (479 F.2d at 586).

[5] Vacated and remanded by U.S. Supreme Court 94 S.Ct. 278, 38 L.Ed.2d 213.

Moreover, in the Fifth Circuit's decision in *United States v. Thevis,* 484 F.2d 1149, the Court recognized that the statutory terminology "obscene, lewd, lascivious and filthy" "does not contain the specifics required by *Miller,*" and that "*Miller* requires that elements of the definition be a part of the statute" (484 F.2d at 1155). Nevertheless, the Fifth Circuit concluded that the statutory deficiences "can be satisfied by a judicial gloss," (484 F.2d at 1154, 1155) and that this subsequently imposed judicial gloss could appropriately be read into indictments retroactively. Yet, in the light of *Miller,* it cannot be said that the words "obscene, lewd, lascivious, indecent, filthy and vile," standing by themselves in an indictment, afford the requisite "fair notice" and "concrete guidelines" required by the Constitution.

Russell v. United States, 369 U.S. 749, is the leading case dealing with the sufficiency of an indictment in a federal prosecution. *Russell* holds that in an indictment upon a statute, *it is not sufficient to set forth the offense in the words of the statute,* unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished. (369 U.S. at 765-766). See also, *United States v. Carll,* 105 U.S. 611, 612. In light of the tortured and unsuccessful efforts of this Court and other courts to define "obscene, lewd, lascivious and filthy," it must be conceded by all that those words, standing alone, fail to set forth "all the elements necessary to constitute the offense" intended to be punished by §1465.

Where, as here, guilt or innocence depends so crucially upon the meaning given to the words "obscene, lewd,

lascivious or filthy," the Indictments must do more than simply repeat the vague language of that criminal statute. "It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species – it must descend to particulars. . . . An indictment not framed to apprise the defendant with reasonable certainty of the nature of the accusation made against him . . . is defective, although it may follow the language of the statute". (369 U.S. at 765). The Court noted that "these basic principles of fundamental fairness retain their full vitality under modern concepts of pleading, and specifically under Rule 7(c) of the Federal Rules of Criminal Procedure . . . " (369 U.S. at 765-766). Where, as in the case at bar, the statutory language does not encompass all the elements of the offense, an indictment which merely repeats the statutory language requires the accused "to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of his conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion . . . to condemn such a practice in a quite different factual setting. Cole v. Arkansas, 333 U.S. 196, 201 212." (369 U.S. at 766). This principle has special application to obscenity prosecutions, where uncertainty as to the meaning of the term "obscene" has characteristically infected criminal proceedings under Section 1465. In the case at bar, we have no clarifying bill of particulars. In any event, *Russell* teaches us that a bill of particulars cannot save an invalid indictment. See, 369 U.S. at 770.

The central fact that emerges from the June 21, 1973 decisions is that the statutory language of Section 1465, and the gloss put on that language by *Roth-Memoirs*, failed to give Petitioner the constitutionally required notice. The Indictments, which merely repeated the defective statutory language were, therefore, fatally infirm. See, *United States v. Vuitch*, 402 U.S. 62; *Rabe v. Washington*, 405 U.S. 313; *Cole v. Arkansas*, 333 U.S. 196; *DeJonge v. Oregon*, 299 U.S. 353. See also, *Smith v. Goguen*, 94 S.Ct. 1242; *Gooding v. Wilson*, 405 U.S. 518; *Papachristou v. City of Jacksonville*, 405 U.S. 156.

4. The Court of Appeals held that the standard for judging *scienter* in a federal obscenity prosecution is merely "a general knowledge that the material is sexually oriented" (490 F.2d at 75). Whether such standard satisfied constitutional requirements presents, it is submitted, a substantial question. Petitioners contend that, at a bare minimum, the Constitution requires proof of knowledge of the contents of the challenged materials. In any event, no competent evidence was adduced even to prove Petitioners' knowledge under the standard adopted by the Court of Appeals.

A. It should be noted initially, as heretofore indicated, that the Indictments charged only that the Petitioners acted "knowingly." Requests by the Petitioners for the Government to particularize the precise "knowledge" the Petitioners were alleged to have had at the time of the commission of the alleged offenses [App. 134-135] were refused by the Government [App. 59]. A motion to dismiss the Indictments [App. 141] which raised the *scienter* issue was denied. Motions for judgment of acquittal [App. 649], which again

raised the question of the sufficienty of the proof of *scienter* [App. 656-658], were also denied [App. 672].

As the trial commenced, therefore, the Petitioners were unable to determine whether they were charged with intentionally transporting or causing to be transported "obscene" material; or charged with intentionally transporting or causing to transport allegedly obscene material, knowing solely the contents of the said material; or charged with intentionally transporting or causing to transport allegedly obscene material, knowing solely that the material was "sexually oriented"; or charged with intentionally transporting or causing to transport allegedly obscene material, knowing the said material to be obscene, with the specific intent to appeal to prurient interest.

It was not until the commencement of the trial that the Government indicated its theory. In the opening statement by counsel for the Government [App. 275], the said counsel stated to the jury:

> "Additionally the government must prove, of course, that the defendants did these acts knowingly. That means that the government must prove that the defendants knew the obscene character of the magazines or books at the time they transported them." [App. 279].

On the other hand, when the trial court instructed the jury after the introduction of the evidence by the Government, the Court informed the jury that while the Government had the obligation to prove beyond a reasonable doubt "that the defendands acted with knowledge," this was

merely to insure that no defendant would be convicted because of "innocent mistake, accident or inadvertence" [App. 920]. The trial court instructed the jury that the jury might consider all pertinent evidence "in considering whether or not the defendants had knowledge of the contents of the magazine" [App. 921]. It was sufficient, stated the trial court, if the jury was satisfied beyond a reasonable doubt that defendants "were in some manner aware of the character or contents of the material" [App. 921]. The mere fact that a defendant might have "subjectively believed the materials were not obscene is irrelevant," stated the trial court to the jury [App. 921].

With respect to the issue of aiding and abetting, the jury was instructed that it was necessary to prove that an accused willfully associated himself in some way with the criminal venture and wilfully participated in it. The Court defined an act as wilfully done "if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose, either to disobey or to disregard the law" [App. 922].

The instructions of the trial court were confusing, inconsistent and misleading. See, *Bollenbach v. United States*, 326 U.S. 607, 613-614, 66 S.Ct. 402, 90 L.Ed. 350. While on the one hand the Government at the opening of the trial had indicated that its burden was to prove that Petitioners knew the alleged obscene character of the material involved in the Indictments, on the other hand the jury was left free by the trial court's instructions to convict even if the proof showed no more than knowledge of the contents of material generally disseminated, or knew generally that the material being

transported was "sexually oriented." There was never any attempt made to prove, nor any claim made, that the Petitioners knew the contents of the particular material specified in the Indictments or that they knew the nature and character of such particular material, or even knew that such particular material was obscene, or that he transported or even caused to transport in interstate commerce the specific material named in the Indictments.

B. In *Roth v. United States,* 354 U.S. 476, the Court emphasized that the ambiguities of the standards for judging obscenity could not be reconciled with the due process guarantees of fair notice without proof of guilty knowledge and specific intent. See, cases cited in *Roth,* 354 U.S. at 491-492, and repeated in *Miller v. California,* 93 S.Ct. at 2617, n. 10.

In *Smith v. California,* 361 U.S. 147, the Court held that it was constitutionally impermissible to dispense entirely with the element of *Scienter,* in an obscenity prosecution. Justice Brennan, writing for the Court, stated:

> "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be." (361 U.S. at 154).[6]

[6] Justice Black agreed that the ordinance could not penalize a bookseller, even though he was not aware of its

In *Mishkin v. New York*, 383 U.S. 502, the Court approved a construction of the state obscenity statute which required proof that the accused was in some manner aware of the "character" of the material, together with proof of "calculated purveyance" of the alleged obscene material (383 U.S. at 510). At the same time, the Court rejected a standard which would require mere proof of "knowledge of the contents of the books" (383 U.S. at 510, fn.9). Again, the Court reiterated that it was not yet prepared to define what sort of mental element was requisite to a constitutionally permissible obscenity prosecution (383 U.S. at 511), but the Court emphasized that the Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for "the ambiguities inherent in the definitions of obscenity." (383 U.S. at 511).

In *Redrup v. New York* and *Austin v. Kentucky*, 383 U.S. 767, certiorari was granted in both cases, limited solely to those questions which presented the issue of *scienter* in the petitions. In the *Per curiam* decision which followed, however, the Court decided that the material involved in the cases was not "obscene," the decision being made " without prejudice

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(Footnote 6 Continued)

"obscenity" (361 U.S. at 156). Justice Frankfurter understood the Court's opinion as holding that one could not be accused of violating the obscenity law unless he was charged with "knowledge of the obscenity" (361 U.S. at 161). See, the opinion of Justice Harlan in *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 492-493, and fn. 16. See also, *New York Times Co. v. Sullivan*, 376 U.S. 254,278-279.

to the questions upon which review was originally granted." *Redrup v. New York [Austin v. Kentucky]*, 386 U.S. 767, 770. In his dissent, Justice Harlan noted that in *Smith v. California,* a defendant criminally charged "with purveying obscene material must be shown to have had some kind of knowledge of the character of such material; the quality of that knowledge, however, was not defined," and Justice Harlan expressed regret the Court had not "come to grips with such issues" (386 U.S. at 771-772).

One is not ordinarily guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. Ignorance or mistake of fact negatives the existence of *a mens rea.* Moreover, mere proof of knowledge will not be sufficient unless such knowledge is accompanied by an intent to do the acts which constitute the harm against which the law is directed. Both knowledge and intent must exist before *scienter* can be deemed proven. Knowledge is the foundation of intent; without the knowledge the intent cannot exist. *United States v. Falcone,* 311 U.S. 205. The ordinary criminal law also requires, in many cases, proof of a specific intent, that is, proof of an act done with a bad purpose. See, *Screws v. United States,* 325 U.S. 91; *Dennis v. United States,* 341 U.S. 494, 499.

Every obscenity prosecution implicates First Amendment questions, and therefore the standards for judging *Scienter* in such prosecutions require more critical analysis than exist in the ordinary criminal case. "When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular

circumstances to which it is applied." *Speiser v. Randall,* 357 U.S. 513, 520. Stricter standards governing proof of *mens rea* and specific intent are required in the enforcement of statutes which affect the exercise of the freedoms of speech and press; this in order to avoid the constitutional infirmities which lurk in statutes involving First Amendment rights, and also to preserve the community's right to know which may be seriously affected by the chilling effect and self-induced censorship engendered by laws and prosecutions thereunder which fail to provide exacting standards for judging *scienter.*

As aforesaid, the court below held that mere proof of knowledge that the material was "sexually oriented" was sufficient to establish the requisite *scienter* in an obscenity prosecution. The Court declined to enunciate any other standard, disregarding decisions rendered by this Court which cast a far different light on the importance of maintaining the rights guaranteed by the First Amendment against subtle erosions created by vague and ambiguous statutes and the elimination of strict *scienter* requirements. Thus, the court below did not even require proof of an intent by an accused to commit a public wrong, or proof of knowledge of those operative facts which bring an obscenity statute into play, or proof of knowledge of the alleged obscene character of the material, or reckless disregard of whether or not the material was obscene. Yet such decisions of this Court as *Smith v. California,* 361 U.S. 147; *New York Times Co. v. Sullivan,* 376 U.S. 254, and the *Miller* quintet of decisions rendered on June 21, 1973, make it clear that mere proof of knowledge of the "sexual orientation" of an advertisement or film cannot be deemed to be equivalent of proof of guilty knowledge under the statute and the Constitution.

To permit the conviction of an accused in an obscenity prosecution solely on the basis of purported proof that the accused knew the "sexual orientation" of a film or advertisement is to impose the absolute criminal liability condemned by this Court in *Smith v. California,*. Sex and obscenity are not synonymous, and knowledge of the "sexual orientation" of an advertisement or film dealing with sex plainly cannot be the equivalent of knowledge of the obscene character of the material. Mere proof that a publisher or distributor knew the sexual orientation of the multifold books, magazines and films ultimately held to be entitled to constitutional protection by this Court and other courts, plainly fails to establish that such publisher or distributor knew the alleged obscene character of the material. See, for example, *Grove Press, Inc. v. Gerstein,* 378 U.S. 577; *Weiner v. California,* 404 U.S. 988; *Burgin v. South Carolina,* 404 U.S. 806; *Hartstein v. Missouri,* 404 U.S. 988.

It follows, therefore, that mere proof of knowledge of "sexual orientation" cannot be the standard for judging *scienter* since such standard alone would leave the federal obscenity statute vague, ambiguous, uncertain and overbroad, in violation of the provisions of the First Amendment. Prosecutions under such a standard would violate the due process guarantees which accompany any criminal trial. A jury or trial judge would be left free to presume guilty knowledge under the federal obscenity statute by their own subject predilections, on the basis of arbitrary and irrational inferences and presumptions which undermine all procedural safeguards required in criminal prosecutions, particularly involving speech and press. *Bailey v. Alabama,* 219 U.S. 219; *Tot v. United States,* 319 U.S. 463; *Speiser v. Randall,* 357 U.S. 513. Such an arbitrary standard would encourage the

self-censorship and private suppression of constitutional protected material. *Smith v. California*, 361 U.S. 147; *New York Times Co. v. Sullivan*, 376 U.S. 254.

If an accused may be convicted without any proof that he knew that the material was obscene in nature, and without any possibility of establishing in his own defense his honest ignorance that the material was obscene, then the trial of an obscenity prosecution becomes inherently unfair, and the right to confront witnesses, to present evidence in one's own behalf, and to have the assistance of counsel and a determination by an impartial jury becomes meaningless. Such a determination by a jury, based on its own subjective predilections, is no more than an *ex post facto* determination which visits upon the accused cruel and unusual punishment in the most primary sense of the terms. The notion that everyone "must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd and lascivious" has been rendered untenable by the decisions of this Court since *Roth*, through *Jacobellis, Memoirs, Ginzburg, Redrup, Stanley*, and the June 21, decisions, as well as by the changing social conditions, attitudes, and "sexual revolution" (*Miller v. California*, 93 S.Ct. at 2621) of the past decades. See, *Griswold v. Connecticut*, 381 U.S. 479; *Eisenstadt v. Baird*, 405 U.S. 438; *Doe v. Bolton*, 93 S. Ct. 739; *Roe v. Walde*, 93 S.Ct. 705; *United States v. Klaw*, 350 F.2d 155 (2 Cir. 1965); *In re Winship*, 397 U.S. 358; *United States v. Vuitch*, 402 U.S. 62; and *The Report of the Commission on Obscenity and Pornography*, September 1970.

It is submitted, therefore, that the judgments of conviction herein are constitutionally infirm because the

standard for judging *scienter*, based solely on knowledge of "sexual orientation," does violence to the guarantees of the free speech and press and due process clauses of the First and Fifth Amendments.

C. In view of the foregoing, it is submitted that the proof in the case herein is palpably insufficient to establish the requisite *scienter* on the part of the Petitioners.

In the first place, as heretofore noted, there is no proof and there can be no claim made by the Government of any knowledge on the part of the Petitioners of the contents of the specific material involved in these proceedings, nor is there any proof that these Petitioners transported or caused to transport the specific materials named in the Indictments. The Government was required to prove beyond a reasonable doubt the elements of the charge contained in the Indictments. To convict an accused without any proof of the specific offense charged in an indictment is the sheerest deprivation of liberty without due process of law. *DeJonge v. Oregon*, 299 U.S. 353, 362; *Thompson v. Louisville*, 362 U.S. 199.

If it is sought to sustain Petitioners' conviction solely upon a claim that they generally knew the "contents" of material or generally knew that material was "sexually oriented," then even so the independent evidence is lacking in the record to sustain such a claim. There is not a scintilla of proof in the record that Petitioners directly or indirectly knew that the particular material involved in the Indictments herein substantially exceeded contemporary community standards in the Nation as a whole in the depiction of sex or nudity, appealed to the prurient interest of the average person

or the average person of any identifiable sexually deviant group, or that the particular material was utterly without social importance or value. See, *Luros v. United States,* 389 F. 2d 200 (8 Cir. 1968).

If it is attempted to invoke the concept of "aiding and abetting" under 18 U.S.C. §2, the result, it is submitted, is no different. In the first place, the proof is absent in the record that the other defendants intentionally transported or caused to transport the alleged obscene material named in the Indictments, knowing the material to be obscene and with the specific intent to appeal to prurient interest. Moreover, it is well established that the crime of aiding and abetting is one requiring "specific intent." Mere association, as opposed to participation, is not sufficient to establish guilt. Association must be accompanied by a culpable purpose before it can be equated with aiding and abetting. There is no evidence of such purpose here on the part of the Petitioners Cases have emphasized that mere speculation is not permitted to substitute for proof in such cases. *See, Snyder v. United States,* 448 F.2d 716 (8 Cir. 1971); *United States v. Kelton,* 446 F.2d 669 (8 Cir. 1971); *United States v. Rodgers,* 319 F.2d 1315 (10 Cir. 1970); *United States v. Barber,* 429 F.2d 1394 (3 Cir. 1970); *Hernandez v. United States,* 300 F.2d 114, 123-124 (9 Cir. 1962).

Petitioners respectfully submit that the failure to prove the element of knowledge, even on the standard for judging knowledge adopted by the Court of Appeals, invalidates the judgments of conviction herein.

5. The conduct alleged in the Indictments herein occurred in 1970. The trial was conducted and the verdicts returned in

August, 1971. At the trial, the jury was instructed to determine the customary limits of candor by the contemporary standards of the "entire national community" [App. 912-916], and to determine whether the challenged material appealed to the prurient interest of the average person in the national community as a whole [App. 911-912]. Yet the Government offered no evidence by which the jury could determine the content of the "national" standards. Nor was any attempt made by the Government to prove that the material was utterly without redeeming social value or importance.

The contention made by Petitioners below that the Government had failed to adduce any competent evidence of the essential elements of the offenses charged in the Indictments, was dismissed by the court below with the mere observation that "Expert testimony is not required by the Government to meet its burden of proving that the materials go beyond the customary limits of candor in their description of sex and nudity." Petitioners submit that the Court of Appeals misconceived the issue presented and reached a constitutionally impermissible result.

The trial in the case herein was conducted under the theory that the standards for judging the alleged obscenity of the material were those enunciated by this Court in *Memoirs v. Massachusetts,* 383 U.S. 413,418. Thus the obligation rested upon the prosecution to prove beyond a reasonable doubt three essential elements of the offense, to wit, that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; (c) the material is utterly without redeeming social value.

As this Court noted in *Miller* (93 S.Ct. at 2618-2620) a national standard of First Amendment protection limited both federal and state prosecutions under controlling case law at the time when the trial herein was conducted. In the area of federal prosecutions, it was recognized that the plain intent of Congress in the enactment of federal obscenity statutes was the requirement that the alleged obscenity of publications be measured by a national standard. This was the view of Justice Harlan from *Roth* through *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488, n. 10, and *Memoirs*, 383 U.S. at 458. In *Miller*, the Chief Justice, writing for the majority, noted the past opinions of Justice Harlan and the concurring views of Justice Blackman on this issue. Moreover, under *Memoirs*, the prosecution, in order to prove obscenity, was required to affirmatively establish that the material was "utterly without redeeming social value." *Miller v. California*, 93 S.Ct. at 2613.

As heretofore stated, the Government made no attempt to prove the aforesaid essential elements of the offense. See, *In re Winship*, 397 U.S. 358; and *Memoirs v. Massachusetts*, 383 U.S. 413. Nevertheless, the Petitioner here was convicted on the theory that the essential elements of the offense were those enunciated in *Memoirs*. This Court, however, described the *Memoirs* national standard test as "unrealistic" and "an exercise in futility". The national standard was termed "hypothetical" and "unascertainable"; a standard which was not "provable," and "neither realistic nor constitutionally sound." 93 S.Ct. at 2618-2620. With respect to the "utterly without redeeming social value" test, this Court described the test as imposing a "burden virtually impossible to discharge under our criminal standards of proof." 93 S.Ct. at 2613.

In short, the Petitioners here were convicted without proof of the essential elements of the offense and under

standards which this Court has held are unconstitutional and virtually impossible to establish. To convict an accused without proof of guilt and under palpably unconstitutional and unlawful standards is to deprive the accused arbitrarily and capriciously of his liberty without the slightest semblance of due process of law. *Thompson v. City of Louisville*, 362 U.S. 199; *Tot v. United States*, 319 U.S. 463; *DeJonge v. Oregon*, 299 U.S. 353; *Cole v. Arkansas*, 333 U.S. 196; *Rabe v. Washington*, 405 U.S. 313; *In re Winship*, 397 U.S. 358.

6. The publications and film herein were entitled to constitutional protection when the alleged offenses occurred and at the time the judgments of conviction were rendered. The materials were entitled to constitutional protection under the prior decisions of this Court and indeed, the decisions of this Court rendered on June 21, 1973 support this conclusion. The materials herein do not substantially exceed the candor of those held entitled to constitutional protection in such cases as *Wiener v. California*, 404 U.S. 988; *Burgin v. South Carolina*, 404 U.S. 806; and *California v. Pinkus*, 400 U.S. 922.

As heretofore discussed, if under the *Memoirs* standards, "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment" (93 S.Ct. at 2614, n.3), then it is respectfully submitted the Petitioners could not be fairly charged with knowing that the materials herein were without constitutional protection in the light of the multifold rulings made by the Court with respect to comparable material.

7. The court below concluded that the publications and film herein offended both the *Memoirs* and *Miller* standards (June 21,1973), and adjudged that the convictions could be upheld. Such ruling offends not only the free speech and press and due process guarantees of the Constitution, but the principles of fair notice and protection of an accused from retroactive application of unforeseeable judicial statutory construction.

Insofar as the *Memoirs* standards are concerned, as hereinbefore discussed, none of the materials are obscene in the light of the record herein.

Insofar as the *Miller* standards are concerned, Petitioners' convictions have been affirmed under a statute with a meaning quite different from the one he was charged with violating. The statute as construed is impermissibly vague as applied to Petitioners because of its failure to provide fair notice that criminal liability was dependent upon the unknown specified sexual conduct, or upon some standards other than national, or upon a standard other than "utterly without redeeming social value." *Rabe v. Washington,* 405 U.S. 313. The Petitioners were charged and tried solely under the *Memoirs* standards. It has been repeatedly held by this Court that conviction upon a charge not made, or upon a theory not tried, is a sheer denial of due process of law. *DeJonge v. Oregon,* 299 U.S. 353; *Cole v. Arkansas,* 333 U.S. 196.

Furthermore, the court below manifestly read into the law conduct not previously proscribed and which, in addition, altered the legal rules of evidence, permitting less and different testimony than the law required at the time of the

commission of the alleged offense. See *Bouie v. Columbia*, 378 U.S. 347. This Court recently stated, in *Douglas v. Buder*, 93 S.Ct. 2199, 2200-2201:

> "... We held in Bouie that '[w]hen ... [an] unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime."

The action of the court below is tantamount to an amendment of the Indictments herein, contrary to constitutional commands. The Indictments so amended would no longer be the accusation made by the Grand Jury which returned them. *Ex parte Bain*, 121 U.S. 1, 10, 13.[7]

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[7] As noted earlier, the Court granted certiorari in *Hamling v. United States*, October Term 1973, No. 73-507, in which the questions presented were virtually identical to those presented herein. *Hamling* was argued on April 15, 1974.

Conclusion

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

ROBERT EUGENE SMITH,
Attorney for Petitioners,
New Orleans Book Mart Inc.
Frederick Eno-Mayhew Lund
Robert Mitchum

GILBERT H. DEITCH
Of Counsel.

APPENDIX A.

United States of America, Plaintiff-Appellee, v. New Orleans Book Mart, Inc., Frederick Eno-Mayhew Lund, Michael George Thevis and Robert Mitchum, Defendants-Appellants. No. 71-2594.

United States Court of Appeals, Fifth Circuit. Feb. 19, 1974.

Before TUTTLE, GEWIN and RONEY, Circuit Judges.

PER CURIAM:

This obscenity case, in conjunction with two others being decided today by this panel,[1] arises from convictions obtained prior to the "*Miller* quintet" and our recent decisions in light thereof.[2] The appeals were held pending the Supreme Court's disposition of *Miller*. Virtually every point made on this appeal is now controlled by these recent decisions adversely to appellants. We affirm.

The New Orleans Book Mart, Frederick Lund, Michael Thevis, and Robert Mitchum were convicted of violations of 18 U.S.C.A. §§ 1465 and 2 in that they knowingly

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[1] United States v. Sulaiman, 490 F.2d 78 (5th Cir. 1974) [No. 71-3145]; United States v. Thevis, 490 F.2d 76 (5th Cir. 1974) [No. 72-2664].

[2] Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); Kaplan v. California, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); United States v. 12 200-Ft. Reels of Super 8 mm Film, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973); United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); United States v. Millican, 487 F.2d 331 (5th Cir. 1973); United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973).

transported or caused to be transported obscene material in interstate commerce by common carrier for the purpose of sale or distribution.

(1) Expert testimony is not required by the Government to meet its burden of proving that the materials go beyond the customary limits of candor in their description of sex and nudity. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973), citing with approval United States v. Groner, 479 F.2d 577 (5th Cir. 1973); United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973).

(2) Scienter as to the exact content of the material transported, rather than a general knowledge that the material is sexually oriented, is not required to uphold a conviction under 18 U.S.C.A. § 1465. *See* United States v. Orito, 413 U.S. 139, 93. S.Ct. 2674, 37 L.Ed. 2d 513 (1973); United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973).

(3) 18 U.S.C.A. § 1465, which utilizes the same pertinent language as 18 U.S.C.A. § 1462 ("obscene, lewd, lascivious, or filthy"), is not void for vagueness and overbreadth. *See* United States v. Orito, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973).

At oral argument, recognizing the formidable decision array against them, defendants appropriately modified their argument and urged that their convictions must be reversed due to the timely interaction of their trial with the subsequent Supreme Court clarification and definitional readjustments incorporated in *Miller*. The crux of their appellate argument rests in the recognition that their conviction was under a definition of obscenity gauged by national standards. *Miller* declared a national standard to be unworkable, at least in a state prosecution context, and permitted local community standards as the appropriate

gauge. Defendants argue that since they were tried and convicted under the "unworkable" national standard, their convictions must be reversed and a new trial granted for adjudication under the local community standard. To find them guilty under the new gauge at this juncture would be tantamount to *ex post facto* application of an "intimated" prospective only standard. *See* United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 130 n. 7, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973).

We realize defendants were convicted in what may be called a no man's land. But we also realize that the Supreme Court did not intend by its June 21, 1973 decisions to leave the country without enforceable protection against obscene materials and their purveyors. It is this realization which led this Court in United States v. Thevis, 484 F.2d 1149 (5th Cir. 1973) to develop its dual test approach:

> [W]e conclude that by indiscriminately vacating and remanding these cases, the Supreme Court declared that all obscenity cases which had not reached final adjudication should be re-examined in light of its clarification of previous standards and its declaration of new standards. We do not read this as precluding our application of the *Memoirs* standard to materials involved in transactions occurring in 1970. We base this conclusion on several observations. For one, we note that the Supreme Court in *Miller* stated specifically that *Memoirs* was "correctly regarded at the time of trial as limiting state prosecution under controlling case law." 413 U.S. at 30, 93 S.Ct. at 2618, 37 L.Ed.2d at 435.
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> Further, at no point did the Court indicate that *Miller's* clarification and modification of *Memoirs* was the result of *Memoirs* permitting unconstitutional infringement on efforts to distribute pornography.... We are unable to conclude from the Court's wholesale

remand of these cases, without more, that the Court, concerned as it was for strengthening the power to regulate pornography, chose gratuitously to eliminate constitutionally-valid law that would otherwise be available in prosecuting pending obscenity cases.

Following that opinion, we have examined the publications and film in the case *sub judice* under Memoirs v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966), and under *Miller* and find them to be within the legal parameters of obscenity.

Affirmed.

APPENDIX B.

United States of America v. New Orleans Book Mart, Inc. and Fred Lund.

United States of America v. Peachtree News Company, Inc., New Orleans Book Mart, Inc., Robert Mitchum, and Frederick Eno-Mayhew Lund.

United States of America v. Gravier Street Book Mart, Michael G. Thevis, John C. Martin, and Peachtree News Company, Inc.

United States of America v. Michael George Thevis, Peachtree News Company, Inc., Frederick E. Lund, and New Orleans Book Mart, Inc. (two cases).

United States of America v. Steve Scott, Crim. A. Nos. 32093, 32215, 32216, 32225, 32226, 32188.

United States District Court, E. D. Louisiana, New Orleans Division, Feb. 10, 1971.

RUBIN, District Judge:

Defendants, indicted for transporting obscene materials in interstate commerce, in violation of 18 U.S.C. §§ 1462 and 1465, assert that the materials cannot be considered obscene under the First Amendment, and, that the statutes are unconstitutional for a variety of reasons. An abundant record has been made. Those materials contended to be obscene are seventeen paper cover, magazine type, printed publications featuring photographs of nude persons and two movies.

Some of the publications deal principally with females, some with males, and others are heterosexual. Those featuring females have some photographs of single females, but each also has photographs of several females together or of females and males together in poses that depict sexual activity or suggest it in terms so explicit that nothing is left to the imagination.[1]

A few of the publications featured photographs of nude males, frequently adolescent boys, sometimes displaying penile erections. Only one publication, however, had photographs of one person alone. This was called "Auto Fellatio and Masturbation", and featured photographs of men engaged in practicing fellatio on themselves, or in the apparent act of masturbation.

Each party presented witnesses expert in psychology and psychiatry. One of the witnesses indicated that the publications would be without effect on the viewer. However

[1] Thus, one defense witness testified that a particular photograph did not "depict" cunnilingus but only "suggested" it. This is a photograph of a nude female, with photographic focus on her genital area, showing a male head and face a few inches away, mouth open and tongue out. There are similar "suggestions" in each of these publications of some other kind of sexual activity, each featuring some specific sexual appetite, such as sadism, sodomy, fellatio, homosexuality or lesbianism.

the defense witnesses thought the effect would be sexual arousal of short duration. They noted no inconsistency between considering the effect of these photographs transient and without impact on the viewer's future intellectual and social life and the conventional age old supposition that we learn from what we see and read, and that ideas thus imparted can become a permanent part of one's intellect and produce a lasting effect on his life. The defense witnesses indicated that, accompanied with proper treatment, the publications could have a permanent beneficial effect on married couples with sexual problems.[2]

In sum, the defense witnesses testified that they did not consider the publications obscene;[3] to the extent the photographs influenced conduct in any lasting way, the influence was beneficient; and they did not consider that any of the publications would stimulate the viewer to commit a sex crime. A few persons might be shocked by seeing these pictures, but, with therapy from the witnesses, this would produce no lasting ill effects.

However, the defense witness whose testimony was most persuasive, a practicing psychiatrist, thought that some viewers might be encouraged to perform sexual acts they would

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[2]These witnesses said they showed similar publications to married couples with sexual problems as a means of reducing their inhibitions and encouraging experimentation in sexual activity. One reported that, assisted with the use of such photographs, his treatment enabled female patients who had never experienced an orgasm to have such a sexual experience after only a week or so of therapy. The testimony implied that these inhibition releasing, climax producing results are permanent in nature, as distinguished from the transient sexual arousal awakened when the photographs are viewed without therapy.

[3]One or two witnesses were unable to utilize this legal term as a method of classification.

otherwise not attempt as a result of seeing such photographs. Being allowed to purchase and see photographs of this kind would imply to some persons, this witness said, societal sanction for a type of conduct the individual might otherwise consider forbidden.

The prosecution witnesses found some of the photographs in each publication obscene. They thought the photographs might stimulate persons who had latent sexual problems to "act out" their desires in a manner that would be criminal. They did not think that seeing the photographs would cause a normal person to commit a criminal act.

It was evident that, while these witnesses for both defense and prosecution testified as experts, many of them viewed their roles as advocates. All but one or two had a *priori* convictions concerning the undesirability or desirability of legislation in this area, and their primary interest was either in attacking or defending it. "Having in most cases chosen their sides as moralists," as Murray Kempton said in reviewing the Report of the Presidential Commission on Obscenity, "they seemed to feel the need to present themselves as utilitarians and to give weight to dubious research which, as practical men, they would be embarrassed to claim as the basis for sound principle."[4]

The Report of the Commission on Obscenity and Pornography ("The Report") was introduced and commented on by various witnesses. The findings of a majority of the Commission, as Mr. Kempton notes, "permit and indeed encourage the inference that," as the defense witnesses

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[4]Kempton, "A Feelthy Commission," New York Review of Books, November 19, 1970, p. 24.

testified, "pornography, if it can be said to have an effect at all, tends to be good for you." Ibid.[5]

Considering the Report and all of the testimony, there is at this time no convincing scientific proof that pornography is or isn't harmful. Indeed, the dissenters on the Commission thought that it is "doubtful that we will ever" have such proof "because of the extreme complexity of the problem and the uniqueness of the human experience. * * *" Report, p. 489.

When, in 1873, under the influence of Anthony Comstock, see dissent of Mr. Justice Douglas, in Ginsberg v. N. Y., at 390 U.S. 629 at 654, 88 S.Ct. 1274, 20 L.Ed.2d 195, Congress enacted the statute under which the defendants were indicted, it had none of this evidence before it. It acted on the basis, presumably, of an intuitive judgment much like Nietzsche's, "He who gazes on monsters should beware lest he become a monster himself."

There can be no doubt that the statute is moralistic; it is predicated on the hypothesis that chastity and conventionality in sexual relations are desirable, that viewing photographs or reading materials that encourage sexuality are undesirable, and that the law ought to punish things that might encourage deviation from conventional sexual behavior. In terms it

[5] In fact, the portrait of the pornography patron painted by the Commission would seem to be one many would aspire to. The Report states that customers of "adult movie theaters manifest a good deal of upward sexual mobility." Report, p. 165. Those who buy the picture publications at adult bookstores are "predominantly white, middle-aged, middle class males, most of whom present the physical appearance of economical success and social respectability." Report, p. 293. "* * * [P]ersons who are more experienced recently with erotic materials * * * are more supportive of First Amendment rights * * * and more active in local and national politics. They are also more highly educated and more frequently read books and magazines." Report, p. 236.

identifies an obscene publication by labeling it lewd and filthy; it equates such a publication with other matter of an indecent character.

The Report considered that legislation in this area ought to be narrowly restricted. But this court may not concern itself with whether the statute is wise; the only questions are whether the Constitution prevents the court from finding these materials obscene or if it does not, whether it forbids Congress to enact this law. This decision must turn on the First Amendment, not merely on questions of logical relevance to the end sought and other issues that might be considered were we concerned only with due process.

I. ARE THE PUBLICATIONS CONSTITUTIONALLY NON-OBSCENE AS A MATTER OF LAW?

Despite the plethora of obscenity cases that have inundated the Supreme Court since the premier decision in Roth v. United States, 1957, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498, a majority of the Justices have never agreed on a definition of obscenity or on criteria that enable a court to determine what is obscene. However, some of the justices have indicated that, before material can constitutionally be classified as obscene, it must be submitted to every one of three tests: First, the dominant theme of the material taken as a whole must appeal to a prurient interest in sex. Second, the material must be patently offensive because in affronts contemporary community standards relating to the description or representation of sexual matters. Third, the material must be utterly without redeeming social value. A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 1966, 383 U.S. 413, 418, 86 S.Ct. 975, 16 L.Ed.2d 1.

In applying these tests,the court is obliged to make an independent constitutional judgment as to whether the material involved is constitutionally protected. Jacobellis v. Ohio, 1964, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793.

In oral findings of fact at the conclusion of the hearing, I commented on each of the publications at length. It would be redundant to repeat those comments here. However, a few more general observations may be pertinent.

A. *Prurience*

The defense witnesses think that none of the photographs in any of the seventeen publications appeal to a prurient interest. They define "prurient appeal" as a morbid or sick appeal; they say that the pictures do not appeal to a sick interest but to normal sexual curiosity. These witnesses considered that human curiosity about seeing the portrayal of sex acts, however deviant or morbid the act itself might be, is a normal emotion. Of course, if it is normal to be curious about aberrational conduct, nothing could appeal to "prurient interest." Some of the defense witnesses testified that the pictures would have a morbid appeal only to people who are themselves emotionally diseased. Persons whose psychosexual lives are warped would find a morbid appeal in some of these photographs but this would not harm even these emotional cripples; the photographs would be a crutch in their hermitic sex lives.

The word "prurient" was defined in footnote 20 to the opinion in Roth v. United States, 1957, 354 U.S. 476, 487, 77 S.Ct. 1304, 1 L.Ed.2d 1498, to lack "significant difference" from the definition in the A.L.I. Model Penal Code, § 207.0(2) (Tent. Draft No. 6, 1957): "a shameful or morbid interest in nudity, sex or excretion." These definitional terms are all pejoratives: "shameful" is defined by the dictionary as "disgraceful or indecent", "morbid" means "psychologically unhelathy." Each definition in turn invites another, subjective and invidious.

The word "prurient" itself implies a value judgment. Like many other words used in law to express social worth or lack of worth, to distinguish legally acceptable from legally unacceptable conduct, it cannot be precisely defined or

reduced to synonyms susceptible of objective application. Like the philosophical search for a criterion of truth, the effort to define what is "negligence," or what is "due process of law," or, indeed what is "justice," the quest is endless. For the word used as a touchstone itself sums up a societal judgment.

Of course, in dealing with terms of this nature, resort to other words, helps to turn our attention in the intended direction; to indicate the kind of thing that is likely to pass or fail the legal test. Thus our thoughts are thrust in the direction contemplated by the statute by the linguistic contrast of something that is likely to be considered shameful by most members of the community with something that is likely to be considered proper. A picture is not to be condemned merely because it would offend a prude. But it is not to be considered nationally acceptable merely because there are some who are so tolerant that they can never be offended.

The intermediate and proper standard is that of the national contemporary community as a whole. Viewed in the combined light of the witness' testimony, some modest familiarity with psychological and physiological research of the sort done by Kinsey, and by Masters and Johnson, as well as with the psychiatric literature, the photographs in question are sufficiently prurient in my judgment for me to think that it does not violate the Constitution, as interpreted in *Roth*, for Congress to legislate against their transportation in interstate commerce for the purpose of commercial sale.

Even after ample allowance for the variety of sexual practices engaged in by mankind, and for the different partners chosen for sexual purposes, photographs that appeal to interest in (or at least curiosity about) sadism in graphic terms appear to me to be prurient. Photographs that depict oral manipulation of a person's own penis, photographs that contain explicit suggestions of sodomy and lesbianism are all

prurient, even if there are some for whom these practices are in psychiatric terms normal. Indeed, when "the material is designed for and primarily disseminated to a clearly defined deviant sexual group, * * * the prurient appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group." Mishkin v. N.Y., 1966, 383 U.S. 502, 508, 86 S.Ct. 958, 963, 16 L.Ed. 2d 56.

B. *Patent Offensiveness*

It cannot be doubted that, as the defense witness testified, the kind of material involved in these cases is widely distributed. That there is a market for the material does not mean that it does not affront contemporary standards. My own judgment is that the material is sufficiently offensive on its face to affront national standards with regard to the description or representation of sexual matters.

The Supreme Court, in a host of per curiam decisions[6] has held constitutionally protected photographs of nudes

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[6] Federal Cases Involving Federal Statutes: Central Magazine Sales Ltd. v. United States, 1967, 389 U.S. 50, 88 S.Ct. 235, 19 L.Ed.2d 49; Potomac News Co. v. United States, 1967, 389 U.S. 47, 88 S.Ct. 233, 19 L.Ed.2d 46; Books Inc. v. United States, 1967, 388 U.S. 449, 87 S.Ct. 2098, 18 L.Ed.2d 1311; Aday v. United States, 1967, 388 U.S. 447, 87 S.Ct. 2095, 18 L.Ed. 1309. Cases Involving State Statutes: Bloss v. Dykema, 1970, 398 U.S. 278, 90 S.Ct. 1727, 26 L.Ed.2d 230; Conner v. City of Hammond, 1967, 389 U.S. 48; Felton v. Pensacola, 1968, 390 U.S. 340, 88 S.Ct. 1098, 19 L.Ed.2d 1220; Ratner v. California, 1967, 388 U.S. 442, 87 S.Ct. 2092, 18 L.Ed.2d 1304; Friedman v. New York, 1967, 388 U.S. 441, 87 S.Ct. 2091, 18 L.Ed.2d 1303; Keney v. New York, 1967, 388 U.S. 440, 87 S.Ct. 2091, 18 L.Ed.2d 1302; I. M. Amusement Corp. v. Ohio, 1968, 389 U.S. 573, 88 S.Ct. 690, 19 L.Ed.2d 776; Robert Arthur Management Corp. v. Tennessee, 1968, 389 U.S. 578, 88 S.Ct.

featuring emphasis on the genital area. But none of its decisions supports the thesis that the national community now accepts photographs depicting men *and* women engaged in fellatio and cunnilingus, boys with erect penises, males suggesting sex acts with other males, or females suggesting sex acts with other females. The swinging single may be all right, but doubles still don't go. See Hunt v. Keriakos, 1 Cir. 1970, 428 F.2d 606.

C. *Redeeming Social Value*

While the prosecution witnesses saw no redeeming social value in the photographs, the defense witnesses found some such merit in each of them. They said the materials were entertaining. They satisfied curiosity. In the hands of a therapist, they could be used to educate people. While some of these witnesses said they considered some of the material obscene, they perceived no valid legislative reason to act against even these materials.

These photographic materials lack any intellectual content. They cannot be said to appeal to any idea or

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(Footnote 6 Continued)

691. 19 L.Ed.2d 777; Schackman v. California, 1967, 388 U.S. 454, 87 S.Ct. 2107, 18 L.Ed.2d 1316; Corruth Publications v. Wesberry, 1967, 388 U.S. 448, 87 S.Ct. 2096, 18 L.Ed.2d 1310; Avansino v. New York, 1967, 388 U.S. 446, 87 S.Ct. 2093, 18 L.Ed.2d 1308; Sheperd v. New York, 1967, 388 U.S. 444, 87 S.Ct. 2093, 18 L.Ed.2d 1306; Cobert v. New York, 1967, 388 U.S. 443, 87 S.Ct. 2092, 18 L.Ed.2d 1305; Chance v. California, 1967, 389 U.S. 87, 88 S.Ct. 253, 19 L.Ed. 256; Henry v. Louisiana, 1968, 392 U.S. 655, 88 S.Ct. 2274, 20 L.Ed.2d 1343; Mazes v. Ohio, 1967, 388 U.S. 453, 87 S.Ct. 2105, 18 L.Ed.2d 1315.

ideology, however offensive. It is of little moment that they might be put to good use in the hands of an educator; in the hands of the defendants they were intended neither for treatment nor education. In essence, the case for their worth is that they have a market; social value is made the equivalent of market value.

It may be "entertaining" to satisfy a prurient interest in sex, but that does not constitute redeeming social value. Ultimately "redeeming social value" is not found solely on the face (if one can put it that way) of the photographs. It may arise from the use made of them. A photograph depicting actual sexual actions, conventional or unconventional in nature, might serve a useful purpose in the hands of a therapist. But it is implicit in the obscenity statutes that what is permitted for a therapeutic use might be proscribed when put to some other purpose Cf. Davis v. United States, 6th Cir. 1933, 62 F.2d 473, and cases cited therein. Therefore we must consider the use that was actually intended, not its possible use for remedial purposes. In determining this, we may consider not only that the publications were intended for commercial sale but also the methods that were used to display them. Ginzburg v. United States, 1965, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31. Here the material is offered for sale to any adult buyer having the purchase price, not only to therapists and educators. The covers of the publications pander to the prospective purchaser. They are not offered to educate or to enlighten; they are intended to titillate. See Childs v. Oregon, 9 Cir. 1970, 431 F.2d 272.

This is a criminal prosecution for transportation of the materials in interstate commerce, not a civil proceeding against the materials themselves. Cf. United States v. Language of Love, 2 Cir. 1970, 432 F.2d 705. As the Supreme Court has noted, a criminal conviction on the theory of *Ginzburg* "does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use." 388 U.S. at

475, 86 S.Ct. at 949. Applying the *Memoirs* three-way test to the particular interests involved in this specific case, these materials are not protected by the Constitution.

II. VOID FOR VAGUENESS

Defendants next assert unconstitutionality of the statutes themselves as violating the First, Fourth, Fifth and Sixth Amendments to the Constitution, because they forbid the doing of acts in terms so vague that men of common intelligence must necessarily guess at their meaning and differ as to their application; and because they set forth no standards and hence unnecessarily and broadly invade the right to Freedom of Speech protected by the First Amendment; because they lack a definition of what is obscene and because they are susceptible of sweeping and improper application by law enforcement officers.

In *Roth*, in 1957, the United States Supreme Court for the first time reviewed and affirmed a conviction under a related statute, 18 U.S.C. § 1461, dealing with the use of the mails to transport obscene materials. It upheld the constitutionality of that statute. Again in 1966, in Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31, the Court affirmed a conviction under the use of the mails statute without discussing its constitutionality. In United States v. Alpers, 1950, 338 U.S. 680, 70 S.Ct. 352, 94 L.Ed. 457, the court upheld a conviction under the statute involved here without expressly considering its constitutionality. In Redmond v. United States, 1966, 384 U.S. 264, 86 S.Ct. 1415, 16 L.Ed.2d 521, the Court vacated a judgment of conviction for violating the mails statute on motion of the Solicitor General because the prosecution there for mailing private correspondence containing allegedly obscene matter was not in accordance with Department of Justice policies. Justices Stewart, Black and Douglas concurred, "not because [this conviction] violates the policy of the Justice Department, but because it violates the Constitution."

The statute here involved and the use of the mails statute, in principle indistinguishable, have thus been subject to possible constitutional review by the Supreme Court at least four times. The question whether the term "obscene" lacks identifiable content is the very subject of the opinion in *Roth*. That case holds that the statute is not unconstitutionally vague in its designation of what materials may not be transported. The Court then adopted, and since has consistently applied, an approach to the obscenity question in which the issue is not the invalidity of statutory provisions on their face, but whether the provisions are invalid as applied. E.G., Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31; A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1; Redrup v. New York, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed. 515; Note, The First Amendment Overbreadth Doctrine, 83 Harv.L.Rev. 844, 884-887, 921-922 (1970). Thus, the defendants' vagueness argument is rejected.

III. DOES THE STATUTE VIOLATE THE FIRST OR FOURTEENTH AMENDMENT?

Until recently, it appeared that *Roth* and the other obscenity cases were premised on a two-level theory of speech. "There are certain well-defined and narrowly limited classes of speech, the prohibition of which has never been thought to raise any Constitutional problem. These include the lewd and the obscene." 315 U.S. at 571. See, also, Ginsberg v. New York, 1968, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195; Jacobellis v. Ohio, 1964, 378 U.S. 184, 186, 84 S.Ct. 1676, 12 L.Ed.2d 793. A perceptive scholar has suggested that the *New York Times* decision, New York Time v. Sullivan, 1964, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, undermined the two-level rationale, and, "Obscenity, too, it would seem, can claim no talismanic immunity from constitutional limitations." Kalven, The New York Times

Case: A Note on the Central Meaning of the First Amendment, 1964 Sup. Ct. Rev. 191, 217. Nonetheless, even after *New York Times,* the court has withheld the protection of the First Amendment from obscene material. Ginzburg v. United States, 1966, 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31.

The defendants contend that the Supreme Court's decision in Stanley v. Georgia, 1970, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 rejects the two-level analysis for an interest balancing approach: *Roth*, they argue, is now viewed in a different light.

> * * * "*Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither *Roth* nor any other decision of this Court reaches that far. As the Court said in *Roth* itself, '[C]easeless vigilance is the watchword to prevent * * * erosion [of First Amendment rights] by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.' 354 U.S., at 488, 77 S.Ct., at 1311. *Roth* and the cases following it discerned such an 'important interest' in the regulation of commercial distribution of obscene material. That holding cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material." 394 U.S. at 563, 564, 89 S.Ct. at 1246.

The defendants assert that the "right to receive" obscene materials recognized in *Stanley* denotes a societal interest

sufficient to keep the door "tightly closed" against regulation of the sale or transportation of such material, at least where the material is not publicly displayed or shown to minors. Some federal courts have adopted this view of *Stanley*. United States v. Lethe, E.D.Cal. 1970, 312 F.Supp. 421, declaring unconstitutional one of the statutes dealing with mailing obscene material; United States v. Luros, C.D.Cal. 1970, delcaring the statute prohibiting importation of obscene material unconstitutional. See also Karalexis v. Byrne, D.Mass. 1969, 306 F.Supp. 1363, and Stein v. Batchelor, N.D.Tex 1969, 300 F.Supp. 602. And so have some commentators. Katz, Privacy and Pornography: Stanley v. Georgia, 1969, S.Ct. Review 203. Engdahl, Requiem for Roth: Obscenity Doctrine is Changing, 1969. 68 Mich.L.Rev. 185. But compare Gegan, The Twilight of Nonspeech, 1969, 15 Catholic Lawyer 210; Eads, Stanley v. Georgia: A Private Look at Obscenity, 1969, 21 Baylor L.Rev. 503; Karre, Stanley v. Georgia: New Directions in Obscenity Regulation? 48 Texas L.Rev. 646.

I do not agree. *Stanley* involved a prosecution for violation of a state statute prohibiting "knowingly having possession of * * * obscene matter." The defendant, there, had possessed a movie film that was discovered by police while searching for evidence of gambling activity. The Supreme Court's opinion made it clear that a combination of Fourth Amendment interests against "unwanted governmental intrusions into one's privacy" 394 U.S. at 564, 89 S.Ct. at 1248 and First Amendment interests against "control [over] the moral content of a person's thoughts." Id. at 565, 89 S.Ct. at 1248, overcame the "valid governmental interest in dealing with obscenity." Id. at 563, 89 S.Ct. at 1246. Though the rationale was impaired, the result in *Roth* was specifically upheld. It was noted that *Roth* and its progeny had dealt "with the power of the State and Federal Governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter." (Id. at 561; see, also, id. at 563-564, 566, 89 S.Ct. at 1246) Public distribution was thus distinguished from

private possession. The majority concluded that "*Roth* and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home" (*id.* at 568, 89 S.Ct. at 1249).

Thus, the court did not hold in *Stanley* that society's interest in the right to receive could, alone, outweigh all governmental interests in regulating the distribution of obscenity to consenting adults. "The right to receive information and ideas" may be satisfied in other ways than by resort to commercial distributors who purchase from producers in other states. Thus it has been held that society's interest in the privacy of personal correspondence is sufficient to preclude the obscenity conviction of an individual engaged in "swapping" pornographic films with acquaintances. United States v. Dellapia, 2 Cir. 1970, 433 F.2d 1252. The added interest in regulating wide-spread, inter-state commercial distribution networks is sufficient, however, to permit these statutes to stand.[7]

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[7] In view of the decision reached on other grounds, it is unnecessary to reach the defendants' argument that the sole basis for the statute is to legislate morality and that this is beyond Congress' powers. In respect to that argument, however, it may be noted that, in the exercise of the powers given it by the Constitution, Congress does have a legitimate concern with morality as well as public order. Chaplinsky v. New Hampshire, 1942, 315 U.S. 568, 571, 62 S.Ct. 766, 86 L.Ed. 1031. The Nation and the States have a right "to maintain a decent society". See dissent of Chief Justice Warren in Jacobellis v. Ohio, 1964, 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793. Hence when, for example, Congress prohibits the use of the mails to defraud, it may act because fraudulent conduct is immoral, disturbs societal order, and leads to an undesirable kind of social conduct, and not merely because the person who is the victim loses money thereby. The powers of Congress are not circumscribed by the kind of compulsion toward restitution that lies behind some state bad check laws.

A few courts have already held that *Stanley* did not imply that the constitutional right to possess obscene matter privately prevents the Congress from forbidding the transportation of such material for the purpose of public sale. United States v. Melvin, 4 Cir. 1969, 419 F.2d 136; supplemental opinion in United States v. Fragus, 5 Cir. 1970, 428 F.2d 1211; see, also, Gable v. Jenkins, N.D. Ga. 1969, 309 F.Supp. 998.

Assuming that *Stanley* precludes regulation of the interstate transportation of noncommercial pornography and that the literal terms of the statute would prohibit this act, the defendants here may not challenge the statute on the ground that it is overbroad. The Supreme Court has often permitted one whose conduct is not, itself, protected to challenge overbroad statutes that inhibit the exercise of First Amendment activities. E.G. Thornhill v. Alabama, 310 U.S. 88, 96-98, 60 S.Ct. 736, 84 L.Ed. 1093; Dombrowski v. Pfister, 380 U.S. 479, 490-492, 85 S.Ct. 1116, 14 L.Ed. 2d 22; see generally, Stedler, Standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 Yale L.J. 599 (1962). This permits a more rapid elimination of the offending law. When, however, Courts can articulate a rule that excises most of the overbreadth and eliminates much of the chill, an expansive approach to standing is unnecessary to protect First Amendment Interests. Note, the First Amendment Overbreadth Doctrine, 83 Harv. L.Rev. 844, 907-910; cf. Dombrowski v. Pfister, 380 U.S. 479, 491, 85 S.Ct. 1116, 14 L.Ed.2d 22. Judicial consideration of successive applications of the statute is then sufficient.

The commercial-noncommercial test is one that has performed this service in other areas of the law. See Murdock v. Pennsylvania, 1943, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292. Thus, even if the view that interstate transportation of noncommercial pornography is protected be correct, the

defendants may not raise it in this case. "[W]hen a line of excision is available, one standing within the zone which a truncated statute might reach may be barred from setting up the statute's overbreadth as to others."[8]

For these reasons, I do not think that *Stanley* overrules *Roth*, or that the United States has failed to demonstrate a substantial and proper governmental interest.

IV. DOES THE STATUTE DENY PROCEDURAL DUE PROCESS BY FAILING TO REQUIRE PRIOR ADVERSARY HEARINGS?

The statutes also deny the defendants due process of law, it is contended, because they do not require sufficient safeguards to assure non-obscene materials the constitutional protection of the First Amendment. This is a mere restatement of the argument that the defendants should have had a prior adversary hearing before the offending materials were seized. If such a hearing is required, it is mandated by the First, not the Fifth, Amendment. See Monaghan, First Amendment "Due Process", 83 Harv.L.Rev. 518 (1970).

There can be no doubt that the bulk of authority supports the defendants' position where evidence is seized pursuant to search warrants issued based on a description of the materials. See the cases cited in United States v. Alexander, 8 Cir. 1970, 428 F.2d 1169. But, as that case points out, in granting a motion to suppress "a number of methods for the securing of evidence remain available to prosecutors." 428 F.2d at 1176. Thus, in that case where there was a "wholesale seizure" under a warrant, the materials were ordered returned without prejudice to a requirement that one copy of each title be delivered to the government by its owner for use in connection with criminal prosecutions.

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[8] Note, The First Amendment Overbreadth Doctrine, 83 Harv. L. Rev. 844, 909.

For the reasons set forth in the motion to suppress (dealing with the seizure of the motion picture film), the seizure here of one copy of each of the seventeen publications to be used as evidence in a criminal prosecution without other seizures and without disruption of the defendants' business activities, is not unconstitutional.

V. DOES THE STATUTE INVADE STATE'S RIGHTS?

The purveyors of these photographs also defend the right of the states alone to prohibit their conduct. If there is a legitimate state interest in forbidding commercial distribution of these materials, Congress may forbid the use of channels of interstate commerce to subvert state policy. See Clark Distilling Co. v. Western Maryland R. Co., 1917, 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (Webb-Kenyon Act).

VI. ARE THE INDICTMENTS DEFECTIVE?

The alleged defects in the indictments lie in their suggested failure to provide a sufficient description of the materials contended to be obscene; in their failure to name the persons "to whom the defendants are alleged to have transported" the publications; and in their failure to charge the defendants with *scienter* or knowledge of the obscene character of the publications. Insofar as these arguments are predicated on the notion that the term "obscene" lacks sufficient meaning, they have already been dealt with. Beyond that, it is not fatal that the indictment fails to name the publications involved or to whom they were sent. The United States has supplied this information to the defendants so that they can adequately prepare their defense.

VII. DID THE GRAND JURY HAVE ENOUGH EVIDENCE TO INDICT?

Defendants argue that the grand jury could not determine the obscenity of the publications without factual evidence of

the violation of the three tests imposed by *Memoirs* and without proper legal instructions. It is not denied that the grand jury saw the publications and formed its own judgment of their obscenity. That is enough.

For the reasons assigned, the motions are denied.

APPENDIX C.

United States Court of Appeals
Fifth Circuit
Office of the Clerk
April 3, 1974
600 Camp Street
New Orleans, La. 70130
Edward W. Wadsworth
Clerk

TO ALL COUNSEL OF RECORD

Re: No. 71-2594 – U.S.A. v. New Orleans Book Mart, Inc., et al.

Gentlemen:

This is to advise that orders have this day been entered denying the petition for rehearing on behalf of Michael George Thevis and the petition for rehearing on behalf of New Orleans Book Mart, et al. No member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petitions for rehearing en banc have also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
/s/ By Susan LeBrun
Deputy Clerk

cc: Mr. Michael Silvers
Mr. J.M. Ausburn
Mr. Stanley Fleishman
Mr. Robert Eugene Smith
Mr. Michael H. Ellis &
Ms. Mary Williams Cazalas

APPENDIX D.

Constitutional and Statutory Provisions.

1. The pertinent provisions of the First Amendment are:

"Congress shall make no law ... abridging the freedom of speech, or of the press..."

2. The pertinent provisions of the Fifth Amendment are:

"No person shall... be deprived of life, liberty, or property, without due process of law..."

3. The pertinent provisions of the Sixth Amendment are:

"In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation..."

4. The pertinent provisions of Article I, §9 are:

"* * * No ... ex post facto Law shall be passed.* * *"

5. The pertinent provisions of Title 18 U.S.C. §1465, are:

"Whoever knowingly transports in interstate commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

"The transportation as aforesaid of two or more copies of any publication or two or more of any article

of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

"When any person is convicted of a violation of this Act, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of such items described herein which were found in the possession or under the immediate control of such person at the time of his arrest." Added June 28, 1955, c. 190, § 3, 69 Stat. 183.

6. The pertinent provisions of 18 U.S.C. §2, are:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." (June 25, 1948, c.645, 62 Stat. 684; Oct 31, 1951, c.655, § 17b, 65 Stat. 717).